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In the Supreme Court of the United States

OCTOBER TERM, 1986

HUBBARD BROADCASTING, INC., PETITIONER

v.

SOUTHERN SATELLITE SYSTEMS, INC., AND
TURNER BROADCASTING SYSTEM, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

CHARLES FRIED
Solicitor General
CHARLES F. RULE
Acting Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
W. STEPHEN CANNON
Deputy Assistant Attorney General
ANDREW J. PINCUS
Assistant to the Solicitor General
CATHERINE G. O'SULLIVAN
DONALD S. CLARK
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the statutory exemption from liability for copyright infringement available to a communications carrier when the carrier retransmits a television broadcaster's signal (see 17 U.S.C. 111(a)(3)) insulates the carrier from liability if (1) the carrier selects the particular broadcast signal for retransmission, (2) the carrier retransmits a signal that it receives directly from the broadcaster instead of the broadcaster's over the air signal, and (3) some of the nonprogram material carried on the broadcaster's direct signal is different from the material carried on the broadcaster's over the air signal.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	9
Conclusion	19

TABLE OF AUTHORITIES

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 ... 10

Cable Television Report & Order, 36 F.C.C.2d 141, on reconsideration, 36 F.C.C.2d 326, aff'd *sub nom. American Civil Liberties Union* v. *FCC*, 523 F.2d 1344 2

Cable Television Syndicated Program Exclusivity Rules, 79 F.C.C. 663, aff'd *sub nom. Malrite T.V. of New York, Inc.* v. *FCC*, 652 F.2d 1140, cert. denied, 454 U.S. 1143 ..... 4, 12

Capital Cities Cable, Inc. v. *Crisp*, 467 U.S. 691 ..... 3, 12

Eastern Microwave, Inc. v. *Doubleday Sports, Inc.*, 691 F.2d 125, cert. denied, 459 U.S. 1226 .....8, 11, 18

Fortnightly Corp. v. *United Artists Television, Inc.*, 392 U.S. 390 ..... 1, 2

Sony Corp. v. *Universal City Studios, Inc.*, 464 U.S. 417 13

Southern Satellite Systems, Inc., 62 F.C.C.2d 153 5

Teleprompter Corp. v. *CBS, Inc.*, 415 U.S. 394 2

WGN Continental Broadcasting Co. v. *United Video*, 693 F.2d 622 .....5, 14, 15, 18

Statutes and regulation: Page

Communications Act § 201(a), 47 U.S.C. 201(a) 11

Copyright Act of 1976, 17 U.S.C. 101 *et seq.*:

§ 101, 17 U.S.C. 101 2

§ 106, 17 U.S.C. 106 2

§ 106(4), 17 U.S.C. 106(4) 14

§ 106(5), 17 U.S.C. 106(5) 14

§ 111, 17 U.S.C. 111 ..... *passim*

§ 111(a)(3), 17 U.S.C. 111(a)(3) ..... *passim*

§ 111(b), 17 U.S.C. 111(b) 4, 7, 15, 16, 17, 18

§ 111(c)(1), 17 U.S.C. 111(c)(1) 3

§ 111(c)(3), 17 U.S.C. 111(c)(3) 3, 9, 16, 18

§ 111(d), 17 U.S.C. 111(d) 3

§ 111(f), 17 U.S.C. 111(f) 3, 14

§ 504(c), 17 U.S.C. 504(c) 7

§ 801(b)(2), 17 U.S.C. 801(b)(2) 3

§ 801(b)(3), 17 U.S.C. 801(b)(3) 3

47 C.F.R. 76.55(b) 16

Miscellaneous:

Copyright Issues: Cable Television and Performance Rights—Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 1st Sess. (1979) 12

Copyright Law Revision: Hearings on H.R. 2220 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. (1975) 12

Miscellaneous – Continued: Page

51 Fed. Reg. (1986):
p. 12792 6
p. 12816-12817 6

H.R. Rep. 2237, 89th Cong., 2d Sess. (1966) 14,17

H.R. Rep. 94-1476, 94th Cong., 2d Sess. (1976) 2, 3, 9, 10, 15, 17

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. A cable television system transmits to its customers a variety of program services. These program services include the retransmission of the signals of local television stations and, in many cases, the retransmission of the signals of television stations located in other areas of the country. The latter practice is known as the retransmission by the cable system of a "distant" television signal.

Prior to the adoption of the Copyright Act of 1976, this Court twice considered the status under the copyright laws of cable systems' retransmissions of television broadcast signals. In *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968), the Court—interpreting the Copyright Act of 1909—held that a cable system's retransmission of a local television broadcast did not constitute a "performance" within the meaning of the Act and therefore did not infringe the copyrights

of the program material contained in the broadcast (392 U.S. at 400-401). In *Teleprompter Corp.* v. *Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974), the Court declined to adopt a different rule for retransmissions of distant television signals, and held that such retransmissions also did not constitute performances under the statute.

These decisions permitted cable systems to retransmit television signals without incurring any copyright liability, but their practical effect was undercut to some extent by the Federal Communications Commission's "program exclusivity" rule. The rule provided that a broadcast station that obtained from a copyright owner an exclusive license to exhibit a syndicated program in one of the fifty largest television markets could prevent a cable system operating in that market from retransmitting a distant signal containing the program. This exclusivity remained in effect for the entire term of the broadcaster's exclusive license. *Cable Television Report & Order*, 36 F.C.C.2d 141, 181-185, on reconsideration, 36 F.C.C.2d 326 (1972), aff'd *sub nom. American Civil Liberties Union* v. *FCC*, 523 F.2d 1344 (9th Cir. 1975).[1] Thus, the program exclusivity rule maintained to some extent the copyright owner's ability to prevent a cable system from retransmitting the signal of a distant broadcast station when that signal contained copyrighted program material.

Congress enacted Section 111 of the Copyright Act of 1976, 17 U.S.C. 111, in order to resolve "[t]he difficult problem of determining the copyright liability of cable television systems" (H.R. Rep. 94-1476, 94th Cong., 2d Sess. 89 (1976)). Congress concluded that "cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and * * * copyright royalties should be paid by cable operators to the creators of such programs" (*ibid.*). It accordingly defined the rights of a copyright owner so that the unauthorized transmission of a copyrighted work by a cable system constitutes an infringement of copyright. See 17 U.S.C. 101, 106, 111. Recognizing that "it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was

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[1] Broadcast stations in the next fifty markets were given more limited rights.

retransmitted by a cable system," Congress established a "compulsory copyright license for the retransmission of those over-the-air broadcast signals that a cable system is authorized to carry pursuant to the rules and regulations of the FCC." H.R. Rep. 94-1476, *supra*, at 89; see also *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 709-710 (1984).

The compulsory license extends only to the "secondary transmission" of a "primary transmission," two terms that the statute defines by reference to one another. Thus, a primary transmission is "a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service" (17 U.S.C. 111(f)). A secondary transmission is "the further transmitting of a primary transmission simultaneously with the primary transmission" (*ibid.*).[2] Section 111(c)(1) provides that "secondary transmissions to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission * * * shall be subject to compulsory licensing" as long as the cable system satisfies certain requirements relating to the payment of royalty fees into a fund maintained by the Register of Copyrights (17 U.S.C. 111(c)(1)).[3] The cable systems may not alter the programming, commercial advertising, or station announcements transmitted by the broadcast station (17 U.S.C. 111(c)(3)).

Section 111 also contains a provision that provides a "safe harbor" from liability for copyright infringement for a communications carrier that serves as the link between the broadcast station and the cable system, transmitting the signal from the broadcaster's geographic area to a distant cable system. Such a retransmission of a broadcast signal is not an infringement of copyright—and therefore need not be authorized by a license—if the retransmission is performed by a carrier that "has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the

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[2] Nonsimultaneous transmission is permitted in certain circumstances not applicable here. See 17 U.S.C. 111(f).

[3] The Copyright Royalty Tribunal distributes the royalties among persons holding the copyrights relating to that programming. 17 U.S.C. 111(d), 801(b)(2) and (3).

secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others" (17 U.S.C. 111(a)(3)).

The statute provides that neither the compulsory license nor the exemption from liability for a carrier is available in one specific situation. Section 111(b) states that "the secondary transmission to the public of a primary transmission * * * is actionable as an act of infringement * * * if the primary transmission is not made for reception by the public at large but is controlled and limited to reception by particular members of the public" (17 U.S.C. 111(b)).[4]

After the Copyright Act of 1976 was enacted, the FCC rescinded its program exclusivity rule. *Cable Television Syndicated Program Exclusivity Rules*, 79 F.C.C.2d 663 (1980), aff'd *sub nom. Malrite T.V. of New York, Inc.* v. *FCC*, 652 F.2d 1140 (2d. Cir. 1981), cert. denied, 454 U.S. 1143 (1982). Thus, a local broadcaster no longer may prevent a cable system from retransmitting a distant signal that contains copyrighted works, even if the local broadcaster has obtained from the copyright owner an exclusive license to broadcast those works.

2. Respondent Turner Broadcasting System, Inc., owns and operates WTBS, a television station located in Atlanta, Georgia. Turner Broadcasting decided to expand WTBS's audience by actively urging cable systems to retransmit WTBS's programming to their customers. By mid-1976, WTBS was carried by nearly 100 cable systems in a five-state area surrounding Atlanta. Pet. App. A39; C.A. App. 176-177, 186-188; Stipulation of Facts 1 paras. 8-9.

Turner Broadcasting determined that it could make WTBS's signal available to a far greater number of cable systems by using satellite technology to retransmit the broadcast signal; it

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[4] The statute provides, however, that the secondary transmission of such a controlled primary transmission is not actionable if the primary transmission is made by a broadcaster, the carriage of the secondary transmission is required by the Federal Communications Commission, and the primary transmission "is not altered or changed in any way by the secondary transmitter" (17 U.S.C. 111(b)).

established respondent Southern Satellite Systems, Inc., to accomplish this goal. Turner Broadcasting subsequently decided that the retransmission of the broadcast signal should be accomplished by a separately owned company and, therefore, sold Southern Satellite to its current owners for the sum of one dollar. Pet. App. A40; C.A. App. 176-183. Southern Satellite is licensed by the FCC as a resale common carrier authorized to retransmit television signals to cable systems throughout the country. *Southern Satellite Systems, Inc.*, 62 F.C.C.2d 153 (1976).[5] Since 1976, Southern Satellite has utilized satellite technology to retransmit the WTBS broadcast signal to cable systems outside the Atlanta area.

In February 1979, with the approval of the FCC, Southern Satellite constructed a direct microwave link between its satellite transmission facility and the WTBS studios in order to improve the quality and reliability of the signal retransmitted to its cable customers. C.A. App. 170, 466.[6] Southern Satellite thus can retransmit either the WTBS broadcast or the microwave signal. Its equipment automatically selects the microwave signal for retransmission; the broadcast signal is substituted if the microwave signal weakens or disappears. Southern Satellite does not alter the signal that it receives from WTBS. Pet. App. A12, A24-A25, A40-A43, A53-A54; C.A. App. 293-300.[7]

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[5] The FCC determined, in granting the authorization, that there was "no significant corporate affiliation" between Southern Satellite and Turner Broadcasting (62 F.C.C.2d at 160-161).

[6] The signal travels from the WTBS studio over a hard wire cable owned by Turner Broadcasting to the microwave transmitter and antenna owned by Southern Satellite. This equipment is located on property leased from Turner Broadcasting. Southern Satellite's "uplink" facility receives the microwave signal and directs it to a satellite transponder. The satellite relays the signal to the receiving antennae of cable systems around the country. As of May 1984, 6,000 cable systems carried the WTBS signal to approximately 27 million households. C.A. App. 292-293, 419.

[7] Southern Satellite does insert some material into the "vertical blanking interval" of the WTBS signal (Pet. App. A26). The vertical blanking interval is a 25-line space that is created each time the electron gun that creates a television picture reaches the bottom of the screen, switches off, and returns to the top of the screen. Certain information can be transmitted in this interval and received by televisions equipped with special decoding devices. See *WGN Continental Broadcasting Co.* v. *United Video*, 693 F.2d 622, 623 (7th Cir. 1982).

Since April 1979, the content of the signal fed into the microwave link by WTBS has differed from the content of the signal broadcast over the air to Atlanta television viewers. Although the programming carried on the two signals is identical, Turner Broadcasting substitutes "national" commercials and other nonprogramming material on the microwave signal in place of some of the "local" commercials broadcast in Atlanta.[8] Turner Broadcasting charges higher fees for advertisements carried on the microwave signal than for advertising that appears only on the over the air broadcasts. Pet. App. A40-A42.

Turner Broadcasting's payments of licensing fees to copyright owners are substantially higher now than they were when the WTBS signal was transmitted solely to the Atlanta market. Turner Broadcasting's annual program license fees increased from $710,000 in 1975 to $13.57 million in 1983, while the value of its new program license agreements increased from $820,000 in 1975 to $22.85 million in 1983. C.A. App. 475-476.[9]

Petitioner Hubbard Broadcasting, Inc. owns and operates television stations in Minneapolis/St. Paul, Minnesota; Albuquerque, New Mexico; and Tampa/St. Petersburg, Florida. Petitioner purchases licenses allowing it to broadcast copyrighted programs on its television stations, and sells commercial time to advertisers in conjunction with its broadcasts of those programs. Pet. App. A43; Stipulation of Facts I paras. 4-7. Petitioner entered into five licensing agreements that allowed it to broadcast specified movies and television programs; the agreements prohibited the copyright owners from licensing these works to other broadcast stations or cable systems in petitioner's broadcast areas. Pet. App. A43-A44; C.A. App. 43-129.

Southern Satellite retransmitted to cable systems in petitioner's broadcast areas WTBS's broadcasts of five programs covered by petitioner's licensing agreements (Pet. App.

[8] In the period from October 1982 to April 1983, approximately 40% of the nonprogramming material carried on the microwave signal differed from the nonprogramming material shown on the broadcast signal. C.A. App. 284.

[9] The record in this case does not establish the relationship, if any, between this increase in license fees and WTBS's carriage by cable systems. Cf. 51 Fed. Reg. 12792, 12816, 12817 (1986) (decision of Copyright Royalty Tribunal in 1983 Cable Royalty Distribution Proceeding).

A43-A44). Petitioner subsequently commenced this copyright infringement action against Southern Satellite and Turner Broadcasting in the United States District Court for the District of Minnesota (C.A. App. 9-41). It sought a declaration that Southern Satellite's transmissions were "infringing non-exempt secondary transmissions under the Copyright Act," a permanent injunction barring respondents from infringing the copyright licenses purchased by petitioner, a permanent injunction barring respondents from effecting a "secondary transmission into [petitioner's] local service areas, or to any entity for retransmission in said local service areas, of any copyrighted audiovisual works for which they have not obtained the copyright or an appropriate license for transmission," and an award of statutory damages pursuant to 17 U.S.C. 504(c). C.A. App. 39-40.[10]

The district court granted respondents' motion for summary judgment and dismissed the complaint (Pet. App. A1-A34). The court determined that Southern Satellite's retransmission of the WTBS microwave signal did not constitute copyright infringement under 17 U.S.C. 111(b), and found that Southern Satellite qualifies for the exemption from liability for copyright infringement set forth in 17 U.S.C. 111(a)(3).

3. The court of appeals affirmed (Pet. App. A34-A59). The court first rejected petitioner's assertion that Southern Satellite's retransmission of the WTBS microwave signal constitutes copyright infringement under 17 U.S.C. 111(b). The court found that Section 111(b) applies when the primary transmitter seeks "to narrow the reception of its signal to an identifiable and distinct segment of the general public who generally will either subscribe to or purchase the service provided" (Pet. App. A46-A47). Since Turner Broadcasting does not seek to limit its signal to particular recipients, but instead seeks the broadest possible audience, the court concluded that Section 111(b) does not apply (Pet. App. A47).[11]

[10] The complaint further alleged that Turner Broadcasting contributorily and vicariously infringed petitioner's rights, and that Turner Broadcasting conspired with Southern Satellite to infringe those rights. C.A. App. 36-39.

[11] The court also rejected the contention that the WTBS microwave signal is not eligible for a compulsory license under Section 111, concluding that the provision was not limited to broadcast signals but extended to any other form of transmission to the public (Pet. App. A48-A50).

The court next considered whether Southern Satellite qualified for the exemption for carriers set forth in Section 111(a)(3). Rejecting petitioner's assertion that the cooperation between Southern Satellite and Turner Broadcasting constituted evidence of the former's control of the content of the latter's signal, the court found that "from the perspective of Southern, the motivating force behind the establishment of the microwave link was its desire to provide its customers with a better quality, more reliable WTBS signal. This legitimate business interest on the part of Southern is entirely consistent with the goal of the Copyright Act of making broadly available and allowing the public to benefit from the copyright[ed] works carried on television signals" (Pet. App. A52). The court also concluded that "it is clear from the record that Southern exercises no control over the selection and broadcast of the particular programming or nonprogramming material transmitted by WTBS" (*ibid.*).

The court further found that Southern Satellite's decision to transmit WTBS's signal as opposed to the signal of another broadcast station did not constitute impermissible carrier control over the selection of the primary transmission. Adopting the Second Circuit's conclusion in *Eastern Microwave, Inc.* v. *Doubleday Sports, Inc.*, 691 F.2d 125, 130 (1982), cert. denied, 459 U.S. 1226 (1983), the court of appeals stated that " '[t]echnical restrictions' " forcing a satellite resale carrier to make an " 'initial, one-time determination to retransmit the signals of a particular station, whatever the content of those signals' " do not constitute control over the selection of the primary transmission (Pet. App. A53). The court determined that Southern Satellite's equipment, which automatically selects WTBS's microwave signal for retransmission and shifts to the broadcast signal if the microwave signal weakens or disappears, simply allows Southern Satellite to take advantage of available technology in order to maintain the quality of its transmission, and also does not effect any impermissible carrier control over the selection of the primary transmission (*id.* at A53-A54).

Finally, the court of appeals held that Turner Broadcasting's practice of substituting commercials on the microwave signal does not bar Southern Satellite from utilizing the exemption set

forth in Section 111(a)(3). The court noted that the statute bars the substitution of commercials by a cable system, and observed that petitioner did not argue that "either Southern or any cable system carrying the WTBS signal has ever substituted or in fact has ever attempted to substitute commercials originally placed on the WTBS signal by Turner. * * * Thus, under the literal language of Section 111(c)(3), no infringement based upon commercial substitution has occurred" (Pet. App. A57).[12]

DISCUSSION

Section 111 of the Copyright Act of 1976, 17 U.S.C. 111, addresses "[t]he difficult problem of determining the copyright liability of cable television systems" (H.R. Rep. 94-1476, 94th Cong., 2d Sess. 89 (1976)). This case concerns the application of the highly technical provisions of Section 111 to the relationship between Southern Satellite and Turner Broadcasting—an arrangement that Congress did not specifically address when it designed this complex statutory scheme. In our view, the touchstone for interpreting the requirements contained in Section 111 is Congress's basic intention of protecting copyright owners. Since the insertion of commercials and other nonprogram materials into WTBS's "cable" signal is most unlikely to harm the owners of the copyrights pertaining to that material, the court of appeals' conclusion that Turner Broadcasting's practice does not contravene Section 111 is correct.

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[12] The court further concluded that none of the policies underlying the prohibition upon commercial substitution contained in Section 111(c)(3) were implicated by Turner Broadcasting's practices. It found that the prohibition was based upon Congress's desire to preserve fair competition between cable systems and local broadcasters—"Congress sought to ensure that cable systems were not allowed, while claiming protection of the compulsory license, to compete for local advertising dollars without having to bear comparable programming costs" (Pet. App. A56-A57). The court observed that Turner Broadcasting was not competing with petitioner for local advertising customers and that to the extent the two companies competed for national advertisers, "that competition will exist regardless of Turner's current practices since even absent the microwave signal, Turner's UHF signal will continue to reach a national market and carry national advertising" (*id.* at A57).

Moreover, this question does not warrant review by this Court. First, there is no conflict among the courts of appeals with respect to the issue of statutory interpretation presented here. Moreover, as far as we are aware, there is currently only one other broadcast station that provides an altered version of its signal for transmission to cable systems. Finally, the Federal Communications Commission recently announced an inquiry into the effects of both the compulsory licensing scheme established in Section 111 and the elimination of the program exclusivity rule. For these reasons, the Court need not at this time address the question presented in this case.

1. Section 111 establishes a comprehensive scheme governing liability for copyright infringement in connection with the retransmission of signals initially transmitted by a television broadcast station. One element of this scheme is Section 111(a)(3)—the exemption from liability for copyright infringement afforded to a communications carrier that retransmits a television signal. The question in this case is whether Southern Satellite's retransmissions of WTBS's signal comply with the requirements set forth in this provision.[13]

a. Section 111(a)(3) provides an exemption from liability for "secondary transmitters that act solely as passive carriers" (H.R. Rep. 94-1476, *supra*, at 92). In order to qualify for the exemption, the carrier may not exercise control "over the content or selection of the primary transmission" or over the "particular recipients of the secondary transmission" (17 U.S.C. 111(a)(3)). The carrier's activities with respect to the transmission may not extend beyond "providing wires, cables, or other communications channels for the use of others" (*ibid*).

Petitioner has identified three separate ways in which Southern Satellite allegedly violates these requirements. First,

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[13] Petitioner presented a second question in its petition for a writ of certiorari (at 22-26), contending that the court of appeals erred by declining to consider whether Turner Broadcasting is liable for copyright infringement. The court of appeals found (Pet. App. A58) that "this theory of liability was not asserted in the district court" and declined to consider the theory for the first time on appeal. In view of the fact that the question of Turner Broadcasting's liability was not addressed by either of the courts below, this Court should not consider petitioner's claim in the first instance (see *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)).

Southern Satellite selected the primary transmission by initially deciding to retransmit WTBS's signal. Second, Southern Satellite selects the recipients of its transmissions by providing its service only to its own customers. Third, Southern Satellite actively engages in marketing activities in order to obtain additional customers for its retransmission of the WTBS signal.[14]

We agree with the two courts of appeals that have addressed this issue—the court below (Pet. App. A51-A55) and the court in *Eastern Microwave, Inc.* v. *Doubleday Sports, Inc.*, 691 F.2d 125 (2d Cir. 1982), cert. denied, 459 U.S. 1226 (1983)—that these factors do not render Southern Satellite's retransmissions ineligible for the Section 111(a)(3) exemption. Southern Satellite's initial decision to rebroadcast the WTBS signal was a one-time selection of a primary transmitter made necessary by limitations upon Southern Satellite's retransmission capacity. The courts of appeals have correctly concluded that "[t]echnical restrictions which forced [the carrier] to make an initial, one-time determination to retransmit the signals of a particular station, whatever the content of those signals, do not evidence the 'control over the content and selection of the primary transmission' intended to be precluded under Section 111(a)(3)." *Eastern Microwave, Inc.*, 691 F.2d at 130; see also Pet. App. A53. If Southern Satellite could be found to violate the statute because it made this choice, only a large carrier with the capacity to retransmit an essentially unlimited number of signals—such as the telephone company—would be able to qualify for the exemption.

Southern Satellite also does not exercise control over the recipients of its transmissions; the Communications Act requires Southern Satellite to provide its service to any cable system willing to pay the rate specified in its tariff (see 47 U.S.C. 201(a)). And Southern Satellite's other activities—such as its active marketing of the WTBS signal to cable systems—do not violate the limitations imposed by Section 111(a)(3) because they do not affect the content of the secondary transmission. *Eastern Microwave, Inc.*, 691 F.2d at 131 & n.15; Pet. App. A27-A28.

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[14] Petitioner also has cited Southern Satellite's ability to switch between the two WTBS signals, an issue that we discuss below (see page 13).

Moreover, it appears unlikely that Congress intended to prohibit a carrier such as Southern Satellite from obtaining the benefit of this exemption. The exemption that became Section 111(a)(3) was included in the statute at the urging of the American Telephone & Telegraph Co., which was concerned that the absence of such an exemption might subject it to liability in connection with its provision of retransmission services. See C.A. App. 308-318.

But the telephone company was not the only provider of retransmission services. Broadcast signals also were retransmitted to cable systems via microwave, a medium that closely resembles satellite retransmission in that a microwave service initially selects the broadcast signal to be retransmitted and frequently engages in marketing activities designed to expand the number of its cable system customers. See, *e.g., Cable Television Syndicated Program Exclusivity Rules,* 79 F.C.C.2d at 807-808; *Copyright Law Revision: Hearings on H.R. 2220 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary,* 94th Cong., 1st Sess. 668 (1975); C.A. App. 454. Since Congress apparently did not intend to subject microwave carriers to liability for copyright infringement, satellite retransmission services also should qualify for the exemption set forth in Section 111(a)(3). Indeed, interpreting the provision in this manner comports with Congress's intent by "enhanc[ing] the ability of cable systems to retransmit [copyrighted] programs carried on distant broadcast signals, thereby allowing the public to benefit by the wider dissemination of works carried on television broadcast signals" (*Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. at 711).[15]

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[15] The United States Copyright Office, which was actively involved in the drafting of the 1976 statute, has expressed a different view of the meaning of Section 111(a)(3). It has stated that Congress enacted the provision solely to accommodate the concerns of the American Telephone and Telegraph Co. and that the Section 111(a)(3) exemption therefore is available only to a carrier such as the telephone company that simply provides facilities for the retransmission of a broadcast signal. See *Copyright Issues: Cable Television and Performance Rights—Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 23, 32 (1979) (testimony of Barbara Ringer,

Petitioner also argues (Pet. 19-20) that Southern Satellite exercises impermissible control over the content of the primary transmission because Southern Satellite decides whether to retransmit the microwave signal or the over the air signal. However, Southern Satellite does not choose between these signals on the basis of program content; it simply functions as a conduit for WTBS programming, retransmitting the clearest available WTBS signal. Limiting satellite carriers to the retransmission of a signal actually received over the air, or preventing such a carrier from switching to a clearer signal upon the failure of the signal that it normally transmits, would simply force the carriers to forgo the use of new technology that provides improved signal quality. There is no warrant for interpreting Section 111(a)(3) to require that result.[16]

b. Petitioner contends that the exemption contained in Section 111(a)(3) does not apply here because Southern Satellite retransmits WTBS's microwave signal rather than its broadcast signal. The microwave-satellite link employed by Turner Broadcasting and Southern Satellite was not in general use when Sec-

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Register of Copyrights). Under that view, Southern Satellite would not be entitled to the Section 111(a)(3) exemption. That view—and, indeed, any interpretation of Section 111(a)(3)—would also have implications affecting the ability of carriers such as Southern Satellite to furnish signals directly to consumers receiving signals through satellite dishes.

[16] Petitioner also argues (Pet. 14-17) that Southern Satellite is in a position to control Turner Broadcasting's commercial substitution policies and therefore exercises "control over the content * * * of the primary transmission" within the meaning of Section 111(a)(3). As the court of appeals noted, however, Southern Satellite's purpose in establishing the microwave link was to improve the quality and reliability of its transmissions (Pet. App. A52; see C.A. App. 254); there is no indication that Southern Satellite derives any benefit from Turner Broadcasting's substitution of commercials or has any interest in the content of the commercials. Even if it had constructive knowledge of Turner Broadcasting's practices with respect to the commercial content of the signal, Southern Satellite may not be charged with control over those practices simply because it established a microwave link that serves the legitimate and independent function of improving signal quality. Cf. *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U.S. 417 (1984) (the sale of equipment with constructive knowledge that customers may use the equipment to make unauthorized copies of copyrighted materials does not constitute contributory infringement if the product is capable of a substantial noninfringing use).

tion 111 was enacted in 1976. It does not follow, as petitioner suggests (Pet. 18-19), that the system of exemptions and obligations embodied in Section 111 of the Copyright Act should be construed to apply only to transmissions originally broadcast over the air.

The threshold question under Section 111(a)(3) is whether the WTBS signal received and retransmitted by Southern Satellite qualifies as a "primary transmission." As we have discussed, Southern Satellite retransmits the electronic signal that it receives over the hard wire connecting the WTBS studio to the microwave link. See page 5 & note 6, *supra*. The statute defines a primary transmission as "a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service" (17 U.S.C. 111(f)). The legislative history of Section 111 indicates that the requirement that a primary transmission be made "to the public" was intended by Congress to exclude from Section 111 "private transmissions such as telephone conversations, space communications, closed circuit private telecasts, and private transmissions by computer" (H.R. Rep. 2237, 89th Cong., 2d Sess. 81, 85 (1966)). Transmissions intended for limited public distribution, such as background music services, pay television, and cable television, were classified as primary transmissions (*id.* at 85). The WTBS transmission satisfies the statutory requirement because it is not private but rather is intended for eventual distribution to a portion of the public at large (see Pet. App. A47).[17]

[17] The provisions of the Copyright Act defining an infringement of copyright strongly support the conclusion that a transmission intended to reach the public is a transmission "to the public" within the meaning of Section 111. The statute provides that a transmission infringes a copyright if it interferes with the copyright owner's exclusive right "publicly" to perform or display the copyrighted work (17 U.S.C. 106(4) and (5)). The transmission of a work via any "conceivable forms and combinations of wired or wireless communications media" constitutes a public performance or display of the work as long as the "transmission reaches the public in any form" (Pet. App. A48-A49). The indirect transmission of a work to the public therefore constitutes a public performance or display of the work. See *WGN Continental Broadcasting Co.* v. *United Video, Inc.*, 693 F.2d 622, 625 (7th Cir. 1982).

Indeed, if the indirect transmission of a work to the public did not constitute a public performance or display of the work, a carrier such as Southern

Even though the WTBS signal qualifies as a primary transmission, Southern Satellite still may be liable for copyright infringement if the primary transmission is "not made for reception by the public at large but is controlled and limited to reception by particular members of the public" (17 U.S.C. 111(b)). The legislative history of Section 111(b) cited as examples of controlled transmissions "background music services such as MUZAK, closed circuit broadcasts to theaters, pay television (STV) or pay-cable" (H.R. Rep. 94-1476, *supra*, at 92).

Putting to one side Turner Broadcasting's practice of commercial substitution, the fact that Southern Satellite retransmits the WTBS signal that is provided solely to Southern Satellite, rather than the WTBS over the air broadcast signal, does not by itself trigger the limitation set forth in Section 111(b). Where a special transmission to a carrier simply duplicates the broadcaster's over the air signal, and the content of the transmission is therefore available to the public at large via the broadcaster's over the air signal, there is no reason for Section 111(b) to apply. Section 111 was enacted to safeguard the rights of copyright owners, not to limit the technology used to transmit a broadcaster's signal. Broadcasters and carriers should not be precluded from using improved technology where there is no impact upon substantive rights.

Here, of course, the content of the signal provided to Southern Satellite does differ from the content of the WTBS broadcast signal: Turner Broadcasting includes some substitute commercials and other nonprogram material on the signal transmitted to Southern Satellite. In our view, the fact that this material is carried only on the WTBS "cable" signal does not implicate the concerns that underlie Section 111(b). The limitations upon the compulsory license established in Section 111 primarily are designed to protect two groups—primary transmitters and copyright owners. Turner Broadcasting plainly

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Satellite that does not engage in direct transmission to the public could never be liable for copyright infringement. The exemption in Section 111(a)(3) would then be completely superfluous. See *WGN Continental Broadcasting Co.*, 693 F.2d at 625. Petitioner argued successfully in the district court that Turner Broadcasting and Southern Satellite publicly performed the works at issue in this case. Pet. App. A5.

is not harmed by the commercial substitution at issue here; it is the architect of the commercial substitution plan. Similarly, there can be no injury to the owners of the copyrights pertaining to the substituted material such as the companies whose advertisements are included on the "cable" signal. These advertisers specifically request the inclusion of their copyrighted material on the cable signal and therefore cannot be harmed by the retransmission of that material by Southern Satellite and its cable system customers. Accordingly, there is no reason to interpret Section 111(b) to prohibit the substitution of nonprograming material by Turner Broadcasting.[18]

We note that our conclusion that commercial substitution by a broadcaster does not violate Section 111(b) rests on a narrower ground than the decision of the court of appeals. The court of appeals concluded (Pet. App. A46 (citation omitted)) that the prohibition contained in Section 111(b) applies only if "the primary transmitter itself seeks to limit the reception of its signal to 'particular members of the public.' " Under the court of appeals' interpretation of the statute, Section 111(b) would not be implicated even if Turner Broadcasting carried different program material on the WTBS "cable" signal. In our view, the substitution of program material presents a more difficult ques-

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[18] Petitioner asserts (Pet. 20-23) that Turner Broadcasting's substitution of commercials offends the statutory bar against the substitution of commercials by a cable system (17 U.S.C. 111(c)(3)). But this provision by its terms applies only to actions by a cable system; it does not reach conduct by a broadcaster. And the court of appeals correctly concluded (see note 12, *supra*) that the policies underlying Section 111(c)(3) are inapplicable in the present context – where the distant broadcaster is substituting national commercials but is not competing with local broadcasters for local advertising.

A regulation promulgated by the Federal Communications Commission provides that "[w]here a television broadcast signal is carried by a [cable system], * * * the programs broadcast shall be carried in full, without deletion or alteration of any portion except as required by the [FCC regulations]." 47 C.F.R. 76.55(b). The Commission has not addressed the question whether this rule bars commercial substitution by a broadcaster such as the practice of Turner Broadcasting involved here. No question concerning this regulation is presented in this case.

tion than the practice of Turner Broadcasting at issue here.[19] Since the permissibility of program substitution is not an issue in the present case, we express no opinion regarding the application of Section 111(b) in that situation.[20]

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[19] In contrast to copyright owners of commercials, who ordinarily benefit from wider distribution of the copyrighted materials and would wish to restrict their use only in connection with another product, the holders of copyrights in program materials are endeavoring to market a valuable commodity. It is the latter interest of copyright holders that was the focus of congressional concern.

[20] The court of appeals concluded that Section 111(b) was intended simply to prevent the unauthorized appropriation of transmissions originated by background music services, pay cable systems, and others who, unlike broadcasters, charge their recipients. Under that view, which reflects a plausible reading of the legislative history, the relevant inquiry is whether the originator of the transmission had any interest in limiting its distribution. Thus, the House Commission report concerning an earlier version of Section 111 stated that the predecessor of Section 111(b) imposed copyright liability upon a carrier that "picks up primary transmissions not intended for reception by the public at large" (H.R. Rep. 2237, *supra*, at 82).

The court of appeals observed that its interpretation did not conflict with Congress's primary purpose in enacting Section 111—to protect creators of copyrighted materials—because copyright holders are free to negotiate a license fee from the originator of the transmission commensurate with the transmission's anticipated distribution. Pet. App. A57-A58; see also Br. in Opp. 9-10. Indeed, the record in this case indicates that Turner Broadcasting began paying substantially increased copyright license fees when Southern Satellite began transmitting the WTBS signal. See page 6, *supra*. Congress considered the analogous issue of network broadcasts in 1976 and determined that cable operators should not be required even to pay license fees for their use of network programming because copyright holders could demand compensation from the networks reflecting their national audience. H.R. Rep. 94-1476, *supra*, at 90.

On the other hand, Section 111(b) could be interpreted to limit the compulsory license to transmissions of program material that duplicate the program material in broadcasting signals, even if the originator makes no attempt to limit the distribution of the transmissions. The legislative history of Section 111 indicates that the provision was intended "to establish a compulsory copyright license for the retransmission of those over-the-air broadcast signals that a cable system is authorized to carry pursuant to the rules and regulations of the FCC" (H.R. Rep. 94-1476, *supra*, at 89). Thus, "[t]he compulsory license applies * * * to the carriage of over-the-air broadcast signals and is inapplicable to the secondary transmission of any nonbroadcast primary transmission such as a program originated by a cable system or a cable net-

2. There are additional reasons why this Court need not address the question of statutory interpretation presented in this case. First, the determination of the court of appeals does not conflict with the decision of another court of appeals. Indeed, the court of appeals in this case expressly adopted (Pet. App. A53) the reasoning of the Second Circuit in *Eastern Microwave, Inc.* v. *Doubleday Sports, Inc., supra*. The Seventh Circuit in *WGN Continental Broadcasting Company* v. *United Video, Inc., supra*, held that a satellite carrier does not qualify for the carrier exemption if it alters the broadcaster's signal (693 F.2d at 625-628). Southern Satellite does not alter the WTBS signal, and the rationale of the Seventh Circuit's decision does not in any way conflict with the decision below.

There are, moreover, relatively few "superstations" such as WTBS and, as far as we are aware, only one other such station cooperates with a carrier by providing an altered signal for retransmission to cable systems. In the typical case—where the carrier retransmits a broadcast signal without the broadcaster's cooperation—Section 111 clearly bars both the carrier and the cable system from altering the broadcaster's signal (see 17 U.S.C. 111(a)(3) and (c)(3)). While the legal questions presented here could arise in other contexts,[21] we do not believe that they warrant this Court's attention at this time in the absence of a conflict in the circuits.[22]

Finally, regulatory developments may, as a practical matter, resolve the question presented here. The Federal Communications Commission has directed its staff "to prepare a Notice of Inquiry to study the effect of the compulsory copyright licensing scheme and the syndicated and network program exclusivity

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work. The latter would be subject to full copyright liability under other sections of the [1976 Act]" (*id.* at 93). Section 111(b)'s requirement that a primary transmission be made for reception by "the public at large" could be interpreted to enforce this limitation by ensuring that the carrier exemption and the compulsory license apply only with respect to primary transmissions that resemble broadcast signals.

[21] See, *e.g.*, note 15, *supra*.

[22] The issues are somewhat curtailed in this case, moreover, because the court of appeals declined on procedural grounds to consider one possible theory of liability. See note 13, *supra*.

situation on cable/broadcast competition" (Fact Sheet Regarding Cable Carriage Decision, MM Dkt. No. 85-349, at 2 (Aug. 7, 1986)). The Commission indicated that "[t]he results of this inquiry will be used by the FCC as a basis for possible rule making (in the case of program exclusivity) and/or legislative proposals, as appropriate" (*ibid.*). The outcome of that inquiry cannot, of course, be predicted at this time. If the Commission were to reinstate its program exclusivity rule, however, petitioner would be provided with protection against competing broadcasts such as those at issue here. The pendency of these regulatory proceedings provides an additional reason for the Court to stay its hand.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

CHARLES F. RULE
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

W. STEPHEN CANNON
Deputy Assistant Attorney General

ANDREW J. PINCUS
Assistant to the Solicitor General

CATHERINE G. O'SULLIVAN
DONALD S. CLARK
Attorneys

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